

## Foundation Rules: Establishing Ideal Concepts in Foundation Laws

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### **Abstract:**

*As welfare state, Indonesia is obliged to meet the basic social and economic needs of every citizen in order to guarantee a minimum standard of living. Inclusive welfare development is based on pro-ductivism, universal social investment and democratic governance. This article was conducted using library research with statute, comparative, and conceptual approaches. Meanwhile, data were analyzed descriptively, consisting of quotes. The results show that the foundation organs can be divided into three parts, namely the trustee, management and supervisor. Foundation as a legal entity has a distinctive character. This type of legal entity was born because of a legal act that is the separation of a number of wealth from the founder with a specific purpose. Limitation of the foundation as a legal entity may include several things, namely: the foundation as a legal entity, the wealth separated by the purpose of founding the foundation, does not have members, the founding of the foundation and the articles of association. Finally, it is appropriate that the Foundation Law to be reconstructed (building ideal concept) by including the roles, functions, responsibilities, obligations, and rights of the founders to avoid conflicts that might occur in the future.*

**Kata Kunci:** *Foundation; Legal Entities; Private Law; Welfare State*

### **1. Pendahuluan**

The key principles of the selective strand of welfare developmentalism are productivism, selective social investment and authoritarianism; inclusive welfare development is based on productivism, universal social investment and democratic governance.<sup>1</sup> With the basic freedoms of expression and association upheld, the civil society sector has grown rapidly and intensely. Myriads of new and old organizations are trying to make their voices heard in the public sphere. Several trends exemplify this. It is almost impossible to capture the diversity of the nonprofit sector in Indonesia. There are tens-of-thousands of civil society organizations in Indonesia today, including religious organizations, mass-based membership organizations, unions, ethnic-based organizations, community organizations, nongovernmental organizations, professional associations and politically affiliated organizations.<sup>2</sup>

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<sup>1</sup> Kwon, Huck-ju. (2005). "Transforming the developmental welfare state in East Asia." *Development and Change* 36, (3): 477-97.

<sup>2</sup> Legal entities (normally foundations or *yayasan*) need to report their existence to the authorities. See: Antlöv, H., Ibrahim, R., & van Tuijl, P. (2006). NGO governance and accountability in Indonesia:

Hence, it has long been assumed among Western commentators that rapid economic growth in East and South-east Asia has been achieved without the development of social policies. It has often been inferred that growth without social welfare is not only possible, but beneficial to further strong economic growth.<sup>3</sup>

As welfare state, Indonesia is obliged to meet the basic social and economic needs of every citizen in order to guarantee a minimum standard of living. One of many needs of Indonesian peoples is the establishment of a forum or institution with a special nature and objective in the fields of social, religious and humanitarian. It is called a foundation. The term *foundation* is called *stichting* in Dutch and *foundation* in English.<sup>4</sup> The foundation is a legal entity whose existence in legal traffic in Indonesia has been recognized by the peoples based on the positive legal reality that lives and develops in Indonesian society. The tendency of people to choose the form of a foundation due to<sup>5</sup> *the first*; it is simple in establishing; *the second*, no authorization from the government; *the third*, the public perception that the foundation is not subject to tax.

Indonesia before Foundations Laws, the existence of foundations in social life had been recognized by social, charity, humanitarian-oriented institutions and even engaged in health and education. However, there are no specific provisions governing foundations as a legal basis for establishing these institutions. Although, the word *foundation* is found in the Civil Code (*Burgerlijk Wetboek*) both explicitly and implicitly but does not confirm the understanding or definition of the foundation and the status of legal entity.<sup>6</sup>

In its development, the Supreme Court of the Republic of Indonesia through Decree No. 124 K/Sip/1973 on June 27, 1973 stated that a foundation can be called a legal entity as long as it fulfills the requirements, *the first*; having its own assets, *the second*; having its own (certain) goals, and *the third*; having equipment. This decree does not provide legal certainty and does not clearly regulate the rights and obligations of the foundation's equipment. Before enacting the Supreme Court's decree, the foundation as a legal entity was based only on jurisprudence and doctrine. And then, since August 16, 2001 Indonesia has had a law specifically regulating the Foundation namely Act No. 16 of 2001 concerning foundations. Now, it has been amended to become Act No. 28 of 2004 concerning amendments to Act No. 16 of 2001 concerning Foundations.<sup>7</sup>

Foundation is recognized as private legal entities in which it is recognized as independent legal subjects whose legal subjects are founders or their administrators by the existence of positive law as contained in written rules that are clear and complete, thus providing a clear legal basis for the foundation.<sup>8</sup> Legal entity is a legal subject of human creation based on the law, given the status of supporting rights and obligations like humans. According to the provisions of Article 1653 of the Civil Code, the

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Challenges in a newly democratizing country. *NGO accountability: Politics, principles and innovations*, 147-63.

<sup>3</sup> Hort, S. O., and Kuhnle, S. (2000). "The coming of East and South-East Asian welfare states". *Journal of European Social Policy*, 10(2), 162-184.

<sup>4</sup> Kamaludin, A. (2017). *Administrasi Bisnis*, Makasar: Sah Media, p. 138.

<sup>5</sup> Bastian, I. (2010). *Akuntansi Yayasan dan Lembaga Publik*. Jakarta: Erlangga, p. 6

<sup>6</sup> Budiono, H. (2008). *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan*. Bandung: Citra Aditya Bakti, p. 319

<sup>7</sup> Ais, C. (2006). *Badan Hukum Yayasan*, Cet. II. Bandung: PT Citra Aditya Bakti, p. 1

<sup>8</sup> Anisa, N., Anshari, T., and Nurdin. (2017). Analisis Yuridis Terhadap Yayasan yang Tidak Menyesuaikan Anggaran Dasarnya, *Jurnal Cakrawala Hukum*, 8 (1): 87

existence of legal entities in Indonesia is classified into 3 (three) groups, namely<sup>9</sup> the first, legal entities established by the Government (State authorities); it is for the State's interests in the government; the second, legal entities as recognized by the Government (State authorities); it is aimed at obtaining profits or welfare of the community through certain business activities, such as limited liability companies and cooperatives; the third, permitted legal entities or for a particular purpose that is ideal, such as social foundation, religious foundation and humanitarian foundation.

For the foundation continues to do its duties and functions, then the foundation may establish a business entity whose activities are in accordance with its goals and objectives. The foundation can also invest in various forms of prospective business entity with the provisions that all such investments shall be no more than 25% of the total value of the wealth of foundation.<sup>10</sup> At present, there are many foundations established in Indonesia with various fields. Seeing from the procedures it was established, foundations can be divided into 2 (two) namely foundations established by the authorities or the government, including State-Owned Corporation and Regional-Owned Corporation, and foundations established by individual and the private sector.<sup>11</sup>

Based on the construction of the problem of foundation, this article will focus on the study of the existence of the Foundation Law, in which it does not regulate the founders which is crucial. In addition, if a foundation is dissolved, its asset becomes an issue concerning the founders. This article is a normative-legal research by using statute, comparative, and conceptual approaches.<sup>12</sup> Meanwhile, data were analyzed descriptively, consisting of quotes.

## 2. Characteristics of Foundation Legal Entities in Indonesia

In Indonesia, there are two kinds of legal entities for non-profit organizations: foundations (*yayasan*) and associations (*perkumpulan*). Foundations were first recognized as a legal entity during the Dutch colonial era (1870) as non-membership organizations. Most foundations were established under the European legal system, while some adhered to other legal systems such as *wakaf* (donations or grants under Islamic law).<sup>13</sup>

The past Paul Scholten's ideals who wanted a foundation to be a legal entity finally came true through the establishment of Act No. 16 of 2001 concerning Foundations.<sup>14</sup> According to Friedrich Carl Von Savigny, the legal entity was established solely by the State. A legal entity is only a *fictie* which does not actually exist, but people create in their shadow a legal entity as a legal subject that is calculated to be the same as humans.<sup>15</sup> While, Gatot Supramono said a legal entity can also be interpreted as a

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<sup>9</sup> Muhammad, A. (2010). *Hukum Perdata Indonesia*. Bandung: PT Citra Aditya Bakti, p. 25.

<sup>10</sup> Setianto, A.Y., et al. (2008). *Panduan Lengkap Mengurus Perijinan dan Dokumen Pribadi, Keluarga, dan Bisnis*. Jakarta: Forum Sahabat, p. 70

<sup>11</sup> Bastian, I. *Op. Cit.*, p. 7

<sup>12</sup> Marzuki, P.M. (2008). *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group, p. 93

<sup>13</sup> Antlöv, H., Ibrahim, R., & van Tuijl, P. (2006). *Op. Cit.*

<sup>14</sup> Supramono, G. (2008). *Hukum Yayasan di Indonesia*. Jakarta: Rineka Cipta, p. 16

<sup>15</sup> Simatupang, T.H. (2013). Legalitas Subjek Hukum Yayasan Sebagai Badan Hukum (Kedudukan Yayasan Yang Terbentuk Sebelum Lahirnya UU 28 Tahun 2004 Tentang Perubahan UU Nomor 16 Tahun 2001 Tentang Yayasan), *Jurnal Ilmiah Kebijakan Hukum*, Vol. 7 (1): 8

group of people who are in an organization that has a specific purpose and its own assets and can do their rights and obligations relating to these assets.<sup>16</sup>

Foundation as a legal entity has a distinctive character. This type of legal entity was born because of a legal act that is the separation of a number of wealth from the founder with a specific purpose. It is generally not for profit. In Act No. 16 of 2001 concerning foundations, which was subsequently amended by Act No. 28 of 2004 concerning amendments to Act No. 16 of 2001 concerning foundations, the goals of foundations were determined in a limitative manner, namely social, religious and humanitarian. In addition to wealth and goals, organizations are needed to achieve the founding goals. The following will be explained regarding the limitations of the foundation as a legal entity.<sup>17</sup>

Basically, the foundation is a private legal entity such as Limited Liability Companies and Cooperatives. Private legal entity (*private rechts person*) is a legal entity established based on civil law that concerns the personal interests of people within the legal entity. Therefore, the legal entity is a private entity established by a person for a specific purpose that is profit-oriented, social, educational, scientific, and others according to law that is valid.<sup>18</sup>

The difference between public and private legal entities lies in the procedures of establishment as regulated in Article 1653 of the Civil Code. In this case, the procedures of establishment are related to the law that regulates how the legal entity is established. That a foundation established by a public (government) institution does not change its status as a private legal entity. Even if the founder is a public organ or public official, the foundation established does not have public authority but only within the scope of civil relations. Also, the status of the foundation remains as a private legal entity even if the initial wealth referred to in the establishment originates from State asset (financial).<sup>19</sup> Meanwhile, the difference of legal entities into public and private is based on 2 (two) criteria, namely (1) based on the occurrence, public legal entities are established by the government/state, while private legal entities are established by individuals and (2) based on work field, if the work field is for public interest, the legal entity is a public legal entity, but if the work field is for the benefit of individuals, the legal entity is a private legal entity.<sup>20</sup>

The establishment of a foundation is usually intended for a specific purpose in the scope of social, religious and humanitarian, as well as assets. In accordance with the explanation of Article 8 of Act No. 16 of 2001 concerning the foundation states that the business activities of the foundation' business entities have a broad scope, including human rights, arts, sports, consumer protection, education, environment, health and science. For comparison, we can see the foundation's formulation in Article 285 of the Civil Code of the Netherlands (CCN) which determines: "*A foundation is a legal person*

<sup>16</sup> Supramono, G. (2007). *Kedudukan Perusahaan Sebagai Subjek dalam Gugatan Perdata di Pengadilan*, Jakarta: Rineka Cipta, p. 24

<sup>17</sup> Simamora, Y.S. (2012). *Karakteristik, Pengelolaan dan Pemeriksaan Badan Hukum Yayasan di Indonesia*, Vol. 1 (2).

<sup>18</sup> Sari, E.K., and Simangungsong, A. (2008). *Hukum dalam Ekonomi*. (akarta: PT. Gramedia Widiasarana Indonesia, p. 10.

<sup>19</sup> Rieff, L., and Dharmasaputra, K. (2008). *Di Balik Korupsi Yayasan Pemerintah*. Jakarta: Freedom Institute, p. 32

<sup>20</sup> Pramono, N., and Sularto. (2017). *Hukum Kepailitan dan Keadilan Pancasila-Kajian Filsafat Hukum Atas Kepailitan Badan Hukum Perseroan Terbatas di Indonesia* Yogyakarta: Andi, p. 7

*created by a legal act which has no members and whose purpose is to realize an object stated in its articles using capital allocated to such purpose.”<sup>21</sup>*

In addition to determine the status of the foundation’ legal entity, the Foundation Laws also regulates foundations that can do business activities to support the achievement of the goals and objectives of its establishment. It raises the polemic about whether the foundation can do business or not because it considers the ideal objective of a foundation to be social, humanitarian and religious. Rai Widjaya argues that if it turns out that the foundation has clearly changed its activities to the business sector, it can themselves the type of foundation that was originally established must also be ended, where with the inclusion of the foundation into a business, it certainly the purpose is profit.<sup>22</sup>

It is different with cooperatives, foundations do not have members. It only has guiding, management and supervisors’ organs. This is because basically in the foundation there are separated assets. Because what is an essential element of a foundation is wealth, so if in the course of a foundation the assets are used up, the foundation certainly cannot do activities to achieve its goals. This means that the foundation is dissolved materially. In the case that the foundation is unable to repay debts after being declared bankrupt, the dissolution occurs because of a decision from the district court.<sup>23</sup>

### 3. Building Ideal Concept of Foundation Laws: Case Review

For many years, all forms of foundations were based solely on societal norms and Supreme Court jurisprudence. This form of a foundation is actually derived from the agreements and aspirations of the founders only and then developed into legal practice. When a law is made whether it is suggested by the government or the initiative of the parliament, it is usually possible to respond to the real needs of the community. However, in the course of the law is not always able to accommodate the development and dynamics of society. Therefore, it is normal if a law lags behind with new things that arise in the community. It causes certain laws being ineffective in accordance with its original purpose.<sup>24</sup>

The rules, to be effective again, it must be seen first what makes the law ineffective, whether because the substance of the law that has been left behind, the law enforcement apparatus that is not consistently implementing the law or due to legal culture. In this relation, Lawrence M. Friedman stated that there are 3 (three) components of the legal system from a social science perspective, namely *legal structure*, *legal substance*, and *legal culture*. The structural component is an institution established by the legal system and has a function to support the operation of the legal system. It allows the provision of services and legal making on a regular basis. The substance component is a legal norm as well as those regulated. The cultural component or legal culture is ideas, attitudes, hopes and opinions about law.<sup>25</sup>

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<sup>21</sup> Warendorf, H., et.al., (2009). *The Civil Code of the Netherlands*, US: Kluwer Law International, p. 199.

<sup>22</sup> Widjaya, R. (2006). *Hukum Perusahaan*. Bekasi: Kesaint Blanc, p. 64

<sup>23</sup> Yudi, A., et al. (2008). *Panduan Lengkap Mengurus Segala Dokumen Perijinan, Pribadi, Keluarga, Bisnis, dan Pendidikan*. Jakarta: Forum Sahabat, p. 70

<sup>24</sup> Strine Jr, L. E. (2002). *The Inescapably Empirical Foundation of the Common Law of Corporations*. *Del. J. Corp. L.*, 27, 499.

<sup>25</sup> Friedman, L.M. (1975). *The Legal System, A Social Science Perspective*, New York: Russel Sage Foundation, 1975, p. 11; Warassih, E. (2005). *Pranata Hukum Sebuah Telaah Sosiologis*. Semarang: PT. Suryandaru Utama, p. 81-82



Observing Friedman' theory above, in the context of Act No. 28/2004 on Foundations, it appears that the legal substance is an issue that results in the implementation of law causing disputes among the public, specifically involving the founders of the foundation with the trustees, and supervisors and management.<sup>26</sup> As stated above, that Act No. 28 of 2004 concerning Foundations does not discuss the founders of the foundation. Yet there are often conflicts between the founder, the trustee, the supervisor, and the management.

A case on a conflict between the founder, the trustee, the supervisor, and the management were Yayasan Rumah Sakit Islam Surakarta (hereinafter, 'YARSIS'). Initially, in 1970s YARSIS was founded by Dr. H. Muhammad Djufrie AS, SKM, dr. H. Muhammad Amin Romas, DSMK and Ir. Taufiq Rusdi (the late). The collection of funds to be used to build the hospital was initially carried out by setting aside some of the founder' personal property to a total of Rp. 7.000 (seven thousand rupiah). In order to strengthen the noble ideals, the founders established a Foundation with Deed No. 35 dated November 27, 1970 about Jajasan Rumah Sakit Surakarta which was made before R. Soegondo Notodisoerjo, Notary in Surakarta (the foundation hereinafter referred to as YARSIS) and the subsequent YARSIS established a hospital named "Rumah Sakit Islam Surakarta (RSIS)".

The Deed of Establishment was later amended by Deed No. 32, April 18, 1983 made by R. Hari Poerwanto, SH, notary in Surakarta, and with the enactment of Act No. 16 of 2001 concerning Foundations as amended by Act No. 28 of 2004 made adjustments to the Articles of Association of Yayasan Rumah Sakit Islam Surakarta and the appointment of the Trustees, Management and Supervisors for the first time as referred to in Deed No. 10 dated 20 September 2006 made by Mrs. Wirati Kendarto, SH notary in Sukoharjo, subsequently with the enactment of Act No. 44 of 2009 concerning Hospitals made adjustments to the Articles of Association of Yayasan Rumah Sakit Islam Surakarta as well as changes in the composition of the trustees.

Management and supervisor of Yayasan Rumah Sakit Islam Surakarta as referred to in Deed No. 002 dated September 17, 2011 made by Roro Indradi Sarwo Indah, SH notary in Surakarta, then a change was made for the trustees, management and supervisors as referred to in Deed No. 01 dated March 23, 2013 made by Trilestari Mulinawati, SH., M.Kn, notary in Sukoharjo which has been registered in the List of Foundations of the Ministry of Law and Human Rights under No: AHU.- AHA. 01. 06-422 dated June 5, 2013, and finally as referred to in Deed No. 9 dated June, 12 2014 made by Niken Puspitarini, SH., M Kn, notary in Semarang regarding the Decision on the Meeting of the Trustees of Yayasan Rumah Sakit Islam Surakarta and has been registered in the List of Foundations of the Ministry of Law and Human Rights under No: AHU.- AHA. 01. 06-315 March 24, 2015. In reality, the Deed of Establishment No. 35 dated November 27, 1970 until the latest amendment Deed No. 9, June 12, 2014, the foundation organ at Yayasan Rumah Sakit Islam Surakarta was the Trustees, Supervisors and Management (Ps. 6) and had never known the founder as one of the organ of Yayasan Rumah Sakit Islam Surakarta. This is in accordance with Article 2 of the Foundation Laws.

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<sup>26</sup> Nainggolan, P. (2005). "Tax Incentives and Transparency of NGOs in Indonesia." *Int'l J. Not-for-Profit L.* 8: 30.

However, in accordance with the course of time the word *Islam* in YARSIS was eliminated by the foundation organs, according to them the elimination of the word does not mean the omission of the word *Islam* is also not in accordance with Islamic teachings. From this, the founder of the foundation which is also the Director of YARSIS argues that the omission of the word *Islam* is considered to tarnish the original purpose of the establishment of YARSIS.

Starting with this difference of opinion, the founders of YARSIS sued the foundation organ which was considered to have opposed YARSIS's goal. According to the author, ideally, the founder of a foundation is a person who has separate wealth who later establishes a foundation for social purposes. If the foundation wants to run a business, it can set up a company (limited liability) with a maximum capital of 25% of the foundation wealth. But in the case of YARSIS the founder was also the Director of the hospital.

Observing the dispute above involving the founders and foundation organs, in this case the trustees, it is caused because substantially Act No. 28 of 2004 regarding Foundations does not expressly regulate the roles, functions, responsibilities, obligations and rights of the founders of the foundation. In addition, it is also not explicitly regulated whether the same person can be part of the foundation's organs and at the same time as the founder or at least never as the founder.

As the case, the author argues that it is appropriate for Act No. 28 of 2004 concerning Foundations to be reconstructed (building ideal concept of foundation laws) by including the roles, functions, responsibilities, and obligations as well as rights of the founders to avoid any conflicts that might occur at a later time.

#### **4. Conclusion**

Foundation organs can be divided into 3 (three) parts, namely the trustee, management and supervisor. Foundation as a legal entity has a distinctive character. This type of legal entity was born because of a legal act that is the separation of a number of wealth from the founder with a specific purpose. Limitation of the foundation as a legal entity may include several things, namely: the foundation as a legal entity, the wealth separated by the purpose of founding the foundation, does not have members, the founding of the foundation and the articles of association. As a case of YARSIS, it is appropriate that Act No. 28/2004 on Foundations to be reconstructed (building ideal concept) by including the roles, functions, responsibilities, obligations, and rights of the founders to avoid conflicts that might occur in the future.

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